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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 362.

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA,

Respondent.

Petitioner's Reply Brief to the Respondent's Brief In Opposition.

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I.

This Court Has Inherent Power to Correct Fundamental Defects and to Correct Errors Which Have Been Committed Which Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

In the Respondent's Brief in Opposition to this Petition, the Respondent presents the questions as follows:

1. Whether, following denial of a motion under 28 U. S. C. 2255 to set aside a conviction, a Petition for a Writ of Habeas Corpus seeking the same relief was properly denied for lack of jurisdiction.

2. Whether, if the Habeas Corpus Petition be treated as a second motion under 28 U. S. C. 2255 (the place of imprisonment being within the jurisdiction of the sentencing court), the Petition was, in any event, properly denied.

We submit that the questions as presented by the Respondent do not touch specifically the essence of the issues presented to this Court. It is Petitioner's claim that the District Court erred in denying the Petition for Writ of Habeas Corpus on the asserted basis of lack of jurisdiction to entertain the Writ. It did not adjudicate any of the substantial questions raised by the Petitioner. Likewise, the Court of Appeals in affirming the action of the District Court did not touch on the substantive questions raised by the Petitioner but relied for its affirmance upon technical procedural grounds. Among other things that Court cited the case of *Hill v. United States*, 368 U. S. 424, 82 S. Ct. 468, which quoted from the case of *Sunal v. Large*, 332 U. S. 174, 67 S. Ct. 1588, where this Court held that the remedy of habeas corpus was unavailable to correct the error of the trial court which had denied the Petitioner an opportunity to present a defense which subsequent decisions of this Court had held should clearly have been available to them. This Court stated in the *Sunal* case, *supra*, at pages 181 to 182:

> "We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an eror of law. . . . That error did not go to the jurisdiction of the trial court.

Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Courts of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. . . . If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications . . . Wise judicial administration of the federal courts counsels against such course, *at least where the error does not trench on any constitutional rights of defendants* nor involve the jurisdiction of the trial court." (Emphasis added.)

In this case there are constitutional rights involved, and therefore comes within the exception above emphasized. To avoid repetition, we respectfully refer to the Petition for Writ of Certiorari heretofore filed. Without withdrawing anything therein stated by the Petitioner, we emphasize the fundamental and vital violation by the federal officers of Petitioner's rights to privacy as guaranteed by the Fourth Amendment, which was violated by the federal agents by sending an informer into Petitioner's home, which informer was paid with money and narcotics and who obviously was seeking leniency in the treatment to be afforded him by both

State and Federal Courts, wherein indictments against him were then pending, and which informer had concealed on him by the federal officers a Schmidt electronic device which permitted the Federal officers, who were on the outside of his home and perhaps a block away, to overhear and listen to the conversations betwee Petitioner and the informer and to testify to those conversations in the trial against the Petitioner over his opposition. This was an unequivocable invasion of the Petitioner's privacy which is illegal and should not be countenanced by American law. We respectfully urge that the philosophy expressed in the dissenting opinions of Justice Black, Justice Frankfurter, Justice Douglas and Justice Burton in the case of *On Lee v. United States*, 343 U. S. 747, 72 S. Ct. 967, as well as the dissenting opinion of Justices Brandeis, Holmes and Butler in the case of *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564 should be adopted as the limitations of permissive practices by federal agents in criminal investigations. In the light of the progressive and pernicous practices of federal agents in criminal investigation,[1] which practices have received moral condemnations even from those Justices who have declared that the conduct was not violative of any of the constitutional guarantees, we ask this Court to declare and announce that the practices engaged in by the federal officers in this case be condemned as in violation of the Fourth and Fifth Amendments, and in any event, not worthy of this Country's conception of decency or

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[1] *Olmstead v. United States, supra; Goldman v. United States*, 316 U. S. 129, 62 S. Ct. 993; *On Lee v. United States, supra; Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679.

integrity, which should above all else mark the character of American justice.

It is not a sufficient answer for the Government to say that in such a case as this it is simply an instance where a person has had a conversation with one in whom he made a mistake in trusting—that the informer would not be legally incompetent to testify to the statements made by the defendant. This may be so, but it is another thing entirely to permit the federal officers to testify to what they heard, standing outside of one's house, by use of the electronic device concealed on the person of the informer without knowledge of the defendant. This is not only hearsay but also "dirty business". The time has come to outlaw this practice. "The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicability." (Dissenting opinion by Mr. Justice Frankfurter in the case of *On Lee*[2] *v. United States, supra.*) The essence of the complaint in this case with respect to the use of the electronic device is that it is different from the cases where a federal officer is stationed *outside* of a house or room which he has no warrant or permission to enter, and by the use of a hearing aid, detecta-phone or other device *outside* of the premises is thus enabled to listen to a conversation.

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[2]It is to be remembered that in the *On Lee* case, the informer had gone into the front room of a building, which was used as a laundry, and where the public was invited to go.

In the case of *Silber v. United States*, ... U. S. ....., 82 S. Ct. 1287, this Court, in a case where a defendant did not present to the Court of Appeals or to this Court an issue raised by his motion to dismiss, stated:

> ". . . In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 . . ."

It is submitted that the conduct of the federal agents in this case not only adversly affects the fairness, integrity and public reputation of judicial proceedings . . . but their conduct should be declared to be in direct and complete defiance of the constitutional rights of the Petitioner as guaranteed by the Fourth and Fifth Amendments. As Mr. Justice Douglas said in his concurring opinion in the *Silverman* case, 365 U. S. 505, 513, 81 S. Ct. 679, 683:

> ". . . Our concern should not be with the trivialities of the local law of trespass, . . . Rather our sole concern should be with whether the privacy of the home was invaded. . . ."

Further, the conduct of the federal officers in the investigation and arrest of the Petitioner and the trial of the Petitioner was without due process of law as guaranteed by the Fifth Amendment.

II.

Habeas Corpus or in the Alternative a Successive Motion Under Section 2255 Can Be Availed of to Correct an Error Which Is Constitutional.

It is recognized that generally errors are to be corrected through the appellate route but as this Court stated in the case of *Bowen v. Johnston,* 306 U. S. 19, 26, 59 S. Ct. 442, 446:

> ". . . But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent . . ."

In this case, despite all the efforts of the Petitioner to have an adjudication of the substantive claims which he has set forth there has never yet been an adjudication of them. Denials have either been without opinion or have been based on procedural technical grounds. In the case of *Hodges v. United States,* 368 U. S. 139, 82 S. Ct. 235, this Court dismissed the Wirt of Certiorari which it had previously granted to determine whether the District Court should have accorded Petitioner a hearing under Section 2255, when it appeared that no appeal had been perfected from the original judgment of conviction. Upon examination of the record it was found that the District Court did, in fact, conduct a hearing upon Petitioner's motion but that the minutes of such hearing had been lost. This Court held that whether or not that hearing was adequate need not be determined for it was satisfied from the record and the trial transcript that it was a case where no hearing was required because the files and records

of the case conclusively showed that the Petitioner was not entitled to any relief. There was a dissenting opinion by Mr. Justice Douglas with whom the Chief Justice and Mr. Justice Black concurred in which dissenting opinion it was stated as follows at page 237:

> "If the error now being pressed were a non-constitutional one, relief might be denied, citing Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982. But in that case, where *habeas corpus* was sought to do service as an appeal, we made clear that we were not dealing with constitutional defects in the trial. Id., 332 U.S. at 178, 182, 67 S. Ct. at 1590. When a constitutional issue was presented, we took the other course and allowed relief by way of Sec. 2255, at least until today. See, e. g., Jordan v. United States, 352 U.S. 904, 77 S. Ct. 151, 1 L. Ed. 2d 114. . . ."

It would appear that had constitutional rights been involved in the *Sunal* case, *supra*, this Court, speaking through Mr. Justice Douglas, would not have decided the *Sunal* case as it did, but on the contrary if constitutional rights of the defendants had been involved, we venture to state, from the opinion of this Court and from Mr. Justice Douglas' dissenting opinion above quoted habeas corpus would have been permitted to do the service of an appeal.

Where, as in this case, the Court of Appeals affirmed the original Judgment of conviction without opinion, and this Court denied the Petition for Certiorari without opinion, and where subsequently the sentencing court denied the Petitioner's Motion under Section 2255 without opinion, and subsequently denied

the Petition for Writ of Habeas Corpus without opinion, and where the Court of Appeals affirmed the said denial without adjudicating the substantial questions raised by Petitioner but relied principally on technical procedural grounds, we submit that habeas corpus, or in the alternative, this Petition should be considered as a successive motion under Section 2255, should be permitted. Assuming, for the purposes of discussion, that a sentencing court is not required to entertain a second or successive motion, we submit that it cannot arbitrarily refuse to pass and adjudicate the substantial questions, constitutional and otherwise, raised by Petitioner and then arbitrarily refuse to entertain a second or successive motion for relief. We therefore ask this Court to consider this application for a writ of habeas corpus, or in the alternative, as a successive motion under Section 2255, and thus afford the Petitioner an opportunity to have an adjudication on the merits of the substantial questions raised by him, both constitutional and otherwise.

Without withdrawing what the Petitioner has stated in its Petition for Writ of Certiorari on page 6 with respect to the unconstitutionality of the restrictive provisions of Section 2255, we would like to point out that Section 2255 does not, by its terms, nor was it intended to, abrogate or eliminate the right of a prisoner to test the validity of his imprisonment by any court of competent jurisdiction which, of course, would include the court of jurisdiction at the place of imprisonment which, in most cases, is a court different from that of the sentencing court. In the case of *Hill v. United States*, 82 S. Ct. 468, after citing the

case of *United States v. Hayman*, 342 U. S. 205, 72 S. Ct. 263, this Court stated at page 471:

> ". . . that it conclusively appears from the historic context in which Section 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined . . ."

Further in the same case, this Court stated at page 471:

> ". . . Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum. . . ."

In the *Hill* case this Court held that the failure of the trial court to follow the formal requirements of Federal Criminal Rule 32(a) was not of itself such an error that can be raised by collateral attack. This Court stated at page 471:

> ". . . It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Bowen v. Johnston, 306 U.S.

19, 27, 59 S. Ct. 442, 446, 83 L. Ed. 455, see Escoe v. Zerbst, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566, Johnston v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302."

The errors complained of in this case are of such character as to be the subject of collateral attack. Habeas corpus has been utilized for many years as the vehicle for such attack. If by the enactment of Section 2255 there was no purpose to impinge upon a prisoner's right of collateral attack, and if the sole purpose was to afford him the same rights in another and more convenient forum (*Hill v. United States, supra*), then it would follow that a prisoner has, at least, the same rights in the sentencing court under Section 2255, that he formerly had in the court of jurisdiction where he was imprisoned. We submit that a prisoner can still proceed in such a jurisdiction as he formerly could prior to the passage of Section 2255. In the case at bar the sentencing court is also the court having jurisdiction of the place of imprisonment. The fact that no appeal was taken from the denial, without opinion, of the Petitioner's Motion under Section 2255 by the sentencing court, does not bar him from seeking an adjudication either by habeas corpus or a successive motion under Section 2255. This Court has stated that the principle of *res adjudicata* does not apply to a decision refusing to discharge a prisoner. *Salinger v. Loisel*, 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989; *Waley v. Johnston*, 316 U. S. 101, 62 S. Ct. 964.

In the case of *Price v. Johnson*, 334, U. S. 266, 291, 68 S. Ct. 1049, 1063 (in which case a fourth application for writ of habeas corpus was made), this Court stated:

> ". . . The primary purpose of a ***habeas corpus*** proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

What this Court further said at page 293 of the *Price* case is as true today as it was before the passage of Section 2255:

> "We are not unaware of the many problems caused by the numerous and successive ***habeas corpus*** petitions filed by prisoners. But the answer is not to be found in repeated denials of petitions without leave to amend and without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make ***habeas corpus*** proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons."

This Petitioner has for several years been virtually reaching out his hands to the sky for help—but his substantive claims, if heard, have not been answered. Is it American justice to answer such pleadings with technical procedural denials?

The Court of Appeals, in affirming the denial of the Petition for Habeas Corpus in this case comments upon the fact that Appellant claimed that his Third, Fourth, Fifth and Sixth grounds of the Habeas Corpus application included new questions not advanced in his first Section 2255 Motion. The Court of Appeals stated at 304 F. 2d 154, 156-157:

> ". . . An examination of these claims shows that they are all based upon the fact that decisions of the Supreme Court of the United States subsequent to the original motion under Section 2255 had raised possible new constructions of some statutes applicable to Petitioner's problems. Such matters would not be considered under a writ of habeas corpus prior to the enactment of Section 2255, and consequently would not be applicable as new grounds under a second motion under Section 2255. . . ."

The Court of Appeals then cited the language of this Court in *Sunal v. Large, supra,* which was quoted in the case of *Hill v. United States, supra,* which quotation appears *supra.*

The Court of Appeals apparently did not pay much heed to the following words of this Court, although the Court of Appeals itself quoted this language at page 157:

> ". . . Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. . . . Wise judicial administration of the federal courts counsels against such course. *at least where the error does not trench on any con-*

stitutional rights of defendants nor involve the jurisdiction of the trial court. . . ." (Emphasis added.)

The errors complained of in this case are not only constitutional but are also such as impair the fairness, integrity and public reputation of judicial proceedings.

III.

The Action of Both the Court of Appeals and the District Court Should Be Reversed as the Government, in Its Answer and Return to the Section 2255 Motion, as Well as the Petition for Writ of Habeas Corpus, Did Not Deny the Substantive Allegations of Either of Said Applications.

The government admits at page 6 of its Brief that in its answer to the Motion under Section 28 U. S. C. 2255 it contended that such a motion does not lie to raise the matters alleged. It further admits at page 8 of its Brief that in the Return to the Petition for Habeas Corpus the government made the point that the court was without jurisdiction to entertain the Petition for Habeas Corpus. It further admits at page 9 of its Brief that the District Court denied the Petition for Habeas Corpus on the asserted lack of jurisdiction. The Court of Appeals affirmed on technical procedural grounds.

The Respondents concede at page 13 of their Brief that at least one of the grounds alleged in the Section 2255 Motion, namely the third ground which generally was that the testimony of the informer, Sussman, was obtained as a result of an agreement of favorable treatment and leniency on the charges pending against the

said informer in both the State and Federal Courts, is properly cognizable under Section 2255. It is obviously impossible to have testimony directly showing such an agreement. At most, one can only show the facts from which a very strong inference is to be drawn. The government, at least, should be required to deny it, and if it does not do so, the allegation should be accepted as a fact. It matters not that the allegation, if true, would only affect the credibility of the witness. If any agreement or understanding was had it was the duty of the District Attorney to affirmatively disclose it. *Napue v. Illinois,* 360 U. S. 264, 79 S. Ct. 1173. The Government in this case seeks to argue the merits of the allegation without having denied the allegation, and without the Court having required any hearing on this very vital matter. The least that should have been done was to require a hearing to be had on this as well as the other allegations. *Walker v. Johnston,* 312 U. S. 275, 61 S. Ct. 574, *Waley v. Johnston,* 316 U. S. 101, 62 S. Ct. 964.

Conclusion.

The Petitioner has been incarcerated since July 10, 1959 as part of the ten year sentence imposed in this case. We respectfully urge that this Court permit the Writ of Certiorari to issue, and we further feel that it would be consistent with the course of justice to discharge the Petitioner forthwith.

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